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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. ~~436~~

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

MOBILE GAS SERVICE CORPORATION AND FEDERAL POWER COMMISSION,

Respondents.

REPLY BRIEF FOR PETITIONER

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Respondent's opposition to granting the Petition is grounded on wholly untenable reasons.

1. The Decision of the Fifth Circuit In Tyler Gas Service Company and the City of Tyler v. United Gas Pipe Line Company, Cause No. 15034, Furnishes New and Additional Inter-Circuit Conflict Constituting Appropriate Ground For Review By This Court.

On November 24, 1954, the Fifth Circuit in an opinion by Chief Judge Hutcheson, affirmed the District Court decision in the *Tyler* case (Cf. Petition p. 15-18), which sought to declare contract rates superior to change under Section 4 until abrogated by the Commission under Section 5(a) of the Act. Defendant moved to dismiss, because the suit sought "to enjoin compliance by the Defendant with the provisions of the Natural Gas Act, and more

theory and contention that the contracts relied on over-ride and nullify the duties, powers, obligations and procedures imposed and conferred by the Act on Defendant as a natural gas company under the Act, indeed over-ride the provisions of the Act itself" (Resp. App. 2-a).

Such contract rate superiority is Respondent's position. The gravamen of *Tyler's* case, as Respondent's, was "that unless and until the contracts sued on are set aside for some invalidity, or after a hearing before the Federal Power Commission, the contract rates are found by the Commission to be unreasonable and are set aside, the contract and the rates they fix are controlling upon the parties to them; and that they may not be rendered null and ineffective by the unilateral action of United in filing with the Federal Power Commission a new schedule with lower* rates" (Resp. App. 5-a).

The District Judge in *Tyler* said, "It is abundantly clear that United may not by private contract fix binding long-term future rates with its customers" (R. 106). The Court of Appeals in affirming said such action would be "in contravention, if not in defiance of the Natural Gas Act and in particular Section 4 thereof, and of the authority and jurisdiction of the Federal Power Commission" (Resp. App. 8-a). This clashes at all points with the holding below that Respondent's contract is superior to Section 4, so that neither Petitioner nor the Commission can lawfully enforce or comply with Section 4 nor the Commission regulate the contract rates until first it abrogates the contract as against public interest.

Below, Respondent contended that since there was a contract fixing rates, Petitioner's filing of new rates under Section 4(d) was "unilateral" and illegal; and the Court

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* The writer is advised of correction in the opinion so that the word "lower" is corrected to read "higher"; and as corrected reading: "and that they may not be rendered null and ineffective by the unilateral action of United in filing with the Federal Power Commission a new schedule with higher rates."

agreed, holding the Commission without power to receive the filing which it further held void. But the Fifth Circuit, rejecting the identical contention made by Tyler, expressly affirmed the District Court holding that such filing under Section 4(d) could not be "unilateral" because "United has but followed the procedure prescribed by Section 4 of the Act, and that when the schedule became effective * * * this would be not contrary but pursuant to the statutory scheme" (Resp. App. 9-a). That the Fifth Circuit viewed Sections 4(d) and (e) as expressly providing for change of contract rates by the natural gas company clearly appears from the further holding that the Trial Court "correctly held that if he could and should restrain United from taking any of the preliminary steps provided by the statute, he should, as plaintiffs pray, restrain them altogether from abrogating or modifying the contract rates, and this, as Sections 4(d) and (e) of the Act make plain, the Court could not do" (Resp. App. 9-a).

Tyler is squarely in conflict with the decision here. Such conflict furnishes appropriate reason for review by this Court to settle the broad and highly important questions of interpretation of the principal provisions of Section 4 of the Act.

But Respondent (p. 11) devises the baseless claim that Tyler is inapposite because arising as a "collateral" proceeding. The short answer is that if, as held below, Petitioner's filing under Section 4(d) was void and the Commission without power to receive or permit such filing, it could be collaterally attacked anywhere for lack of jurisdiction and voidness under the classic bases permitting collateral attack.

The concluding paragraph from *Tyler* quoted at page 12 of the Brief in Opposition must be read with the paragraph immediately preceding it, which then clearly shows that all the Court thereby intended was that no conflict existed with the decision here on the procedural question that the

Commission was the correct forum for determination of the rights asserted. On the primary substantive questions, as shown above, the Fifth Circuit was at categorical pains to frame the conflict it drew respecting the effect, rights, and duties of Section 4 upon private contract rates.

2. Section 5(a) Does Not Support Respondent's Contentions.

Section 5(a), when read in connection with Section 4(d), which is its proper context, clearly shows that Congress by the Act provided that contracts setting rates should always be subject to change at the hands of the natural gas company under Section 4(d), and subject to be lowered by the Commission under Section 5(a). This merely preserves the balance of the regulatory scheme comprehensively provided for by said sections.

Contracts and contract rates by Section 4 and 5 of the Act are treated precisely like rates arising in any other manner. Section 5(a) contains no language which either expressly requires or furnishes color of authority for the notion that a 5(a) proceeding is prerequisite where a *contract* exists before the regulation specified by Section 4 is applicable.

3. Respondent's Attempted Escape From Section 4 Ineffective.

Respondent argues (p. 5-6) that Section 4(d) creates no "obligation" on Petitioner to file change in rates. The courts have held to the contrary (See Petition, p. 11, Fn. 11, p. 11) Respondent does not meet or mention these or any other authorities cited in the Petition.

Respondent principally relies on *Wichita R. R.* v. *Public Utilities Commission* (1922) 260 U.S. 48. That case involved a Kansas statute. This Court held that Section 13 of that statute fixed the *only* way in which a filed and effective rate could be changed, set aside, fixed, determined,

or substituted. Section 13 authorized the Commission "either upon complaint or upon its own initiative" to investigate and have "a full hearing," and "if then the Commission shall find that such rates * * * are unjust, unreasonable, unjustly discriminatory, or unduly preferential," it should "fix and order substituted therefor" just and reasonable rates. The utility claimed Section 20 gave it power comparable to that conferred by Section 4(d) of the Natural Gas Act. But this Court held that Section 20 gave no power to change or affect rates. It thus appears that the Kansas statute was in no manner comparable to the Natural Gas Act; nor did it contain any provisions comparable to Section 4 which expressly authorizes rate changes. In addition Section 13 authorized the Kansas Commission to fix and order rates "substituted" for filed and pending rates. Section 5(a) gives the Commission no such power. The Commission may lower, but not raise, rates; and if the adjudged just and reasonable rates be higher than the filed rates, such adjudged rates under Section 5(a) cannot become effective until the Natural Gas Company files pursuant to Section 4(d).

This Court construed Section 13 as rendering indispensable the finding of unreasonableness; but the Supreme Court of Kansas in the later case of *Consolidated Flour Mills* v. *Kansas Gas & Electric Co.* 119 Kan. 47, 237 Pac. 1037, held that Section 13 did not require the recital of the finding which this Court deemed necessary in *Wichita's* case.

This case is rather ruled by *Midland Realty Co.* v. *Kansas City Power & Light Co.* (1937) 300 U.S. 109, involving a statute almost identical with the Act (See Pet. p. 23-4, FN 27).

The analogy sought for *Federal Power Commission* v. *Niagara Mohawk Power Corp.* (1954) 347 U.S. 239, is artificial and inapposite. That case involved conflict between rights claimed under license from the Federal Power Com-

mission with rights claimed under conveyances and title held under the State. This Court held that "Riparian water rights, like other real property rights, are determined by state law. Title to them is acquired in conformity with that law. The Federal Water Power Act merely imposes upon their owners the additional obligation of using them in compliance with that act." Footnote 18 (p. 413) shows that the Senate Committee reported the Bill so framed as to secure and preserve the very rights claimed to be destroyed by the Federal enactment. Here Congressional intent is equally plain that the Act shall be superior to any and all rates reserved in contracts, and that no rate can be fixed, changed, filed, or charged except one filed by the natural gas company under Section 4, or found by the Commission in a 5(a) proceeding.

Respondent misconceives *Armour Packing Co.* v. *United States* (1907) 209 U.S. 56. Both the Interstate Commerce and Elkins Acts required rates to be filed with the Interstate Commerce Commission, but did not provide that contracts stipulating rates could be filed as rate schedules. This Court held such filed rates to be the only legal rates, superior to contract rates, further stating that whether such contracts might be filed and thereafter control was a matter for Congress. When Congress passed the Natural Gas Act, it did permit by Section 4(c) contracts affecting rates to be filed as rate schedules, but deliberately emasculated any possibility contracts might rise superior to the even uniform scheme of regulation ordered by providing in Sections 4(d) and (e) and Section 5(a) that such contract rates were at all times subject to change either up or down by the natural gas company under Section 4(d) and the Commission, under Sections 4(e) and 5(a). Thus Congress prohibited controlling effect to contracts. *Armour* constitutes strong and indisputable authority for Petitioner's position.

4. The Cases Cited Under Part III of the Brief In Opposition Do Not Support Respondent's Claims Thereabout.

On Page 9-10 of the Brief in Opposition, Respondent cites cases asserted to support the unnatural construction of the Act resulting from the opinion of the Court below.

The *Wichita* case has been demonstrated as inapposite (see p. 4-5 herein).

Hinkle Dry Goods Co. v. *Wichison Industrial Gas Co.* (1933, 10 Cir.) 64 F. 2d 881; *Kaul* v. *American Independent Telephone Co.* (1915) 95 Kan. 1, 147 Pac. 1130; and *Railroad* v. *Court of Industrial Relations* (1923) 113 Kan. 217, 214 Pac. 797, are all cases arising under the same Kansas statute involved in *Wichita*, and are subject to the same distinction. The Natural Gas Act does not condition action or power of the natural gas company or the Commission under Section 4 upon such an express finding.

Attleboro Steam & Electric Co. v. *Narragansett Electric Lighting Co.* (1924, D.C. R.I.) 295 F. 895, is of a class with *Wichita*. While Section 48 of the Rhode Island statute contained language similar to Section 4(d) of the Natural Gas Act, the Court there followed the Supreme Court of Rhode Island in *Rivelli* v. *Providence Gas Co.* (1921) 44 R.I. 76, 115 Atl. 461, in holding that Section 21 deprived the Commission of Rhode Island of authority to accept or fix rates except after hearing and investigation in which it should find that the existing rates are "unjust, unreasonable; insufficient or unjustly discriminatory, or to be preferential or otherwise in violation of the provision of said Public Utilities Act." The District Court held that statute was not distinguishable from that before this Court in *Wichita's* case, and that therefore the ruling would be the same (p. 904). Manifestly that does not touch the situation here.

Arkansas Natural Gas Co. v. *Railroad Commission* (1923) 261 U.S. 379, furnishes no assistance to Respondent, for there the Arkansas statute expressly provided that the

Railroad Commission "shall have no jurisdiction or power to modify or impair any existing contracts for supplying gas to persons, firms, corporations, municipalities, or distributing companies, and such contracts shall not be affected by this Act or the Act of which this is an amendment." The Natural Gas Act contains no such provision.

Southern Utilities Co. v. *Palatka* (1925) 268 U.S. 232, has no connection with the issues here. *Palatka* did not involve a regulatory statute or one claimed to control contract rates. The city granted a franchise to the utility, specifying rates. The utility announced it would increase rates. The city sued to enjoin the increase over franchise rates; the defense, that franchise rates were so low as to deprive the utility of property without due process, was overruled, the utility refused further to plead; injunction issued as prayed for. The Supreme Court of Florida affirmed.

Colorado Interstate Gas Co. v. *Federal Power Commission* (1944, 10 Cir.) 142 F. 2d 943 (affirmed 324 U.S. 581), was a 5(a) proceeding instituted by the Commission and certain municipal and state regulatory bodies to determine whether filed rates were just and reasonable. There was not involved, as here, the question whether a Section 4 filing superseded a contract rate. See that portion under the heading "Abrogation of prices fixed by contract prior to effective date of the Act" (p. 953), in which the Court held that exercise of regulatory power under the Commerce clause could not be subordinated to arrangements previously effected because entered into "necessarily" with "knowledge" of the paramount authority of regulation.

Finally, Respondent quotes out of context two sentences from an order of the Commission dated December 20, 1948, issued in Docket R-107, overruling motions for rehearing of certain parties therein. The full paragraph reads:

> "As stated in Order No. 144, Section 154.85 of the newly amended regulations expresses the Commis-

> sion's intention to permit contracts now on file as effective rate schedules to continue in effect as executed service agreements until they expire or are superseded.' The regulation neither requires that existing contracts remain in effect nor that they be changed. It is permissive only."

The next sentence in the following paragraph, not quoted by Respondent, gives point to the entire matter:

> "The right of a natural-gas company as given by the Natural Gas Act, to make changes in filed rate schedules, tariffs and *contracts*, is preserved, as it must be." (Italics supplied.)

5. The Opinion Below Shows Petitioner's Contention of the Holding Respecting Refunds To Be Correct.

Respondent does not correctly read the opinion below. One of its contentions was that the Commission, having accepted Petitioner's filing under Section 4(d), should have ordered under Section 4(e) that all monies collected pursuant thereto should be held subject to refund. The contention had nothing whatever to do with refunds in the contingency held by the Court, i.e., an illegal filing which the Commission should have refused. The sentence of the opinion below which appears immediately prior to that part quoted on page 13 of the Brief in Opposition makes this abundantly clear:

> "Nor do we reach Mobile's contention that the Commission should have ordered under Section 4(e) that any monies *collected after the acceptance of such filing* be held subject to refund." (Italics supplied.)

The holding Respondent quotes (p. 13) expressly orders a refund of the monies collected. This, the Petition demonstrates, the Court is without power to do, as is the Commission.

CONCLUSION

For reasons set forth in the Petition, it is urged that a writ of certiorari to review the judgment of the Court below should be granted and that these important questions of Federal law which should be but have not been settled by this Court should be reviewed and determined.

Respectfully submitted,

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